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72-1637
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE MAGNAVOX COMPANY OF TENNESSEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions below are set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether under the facts and circumstances presented in this case, a duly certified bargaining representative of

employees can waive its right and that of the employees it represents to distribute literature on Company property in non-working areas.

STATUTE AND REGULATION INVOLVED

The Respondent adds the following relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 33 Stat. 519, 29 U.S.C. 151, *et seq.*):

> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .
>
> * * *
>
> Sec. 9 (e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

The relevant provisions of the National Labor Relations Board, Statements of Procedure — Part 101, as amended (24 F. R. 9095 and 32 F. R. 9547) are as follows:

> Sec. 101.18 Investigation of petition.—(a) . . . The evidence of representation submitted by the petition-

ing labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. . . .

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in subsection (a) of this section.

STATEMENT

The Respondent adds to the Statement of the Petitioner[1] the following: It is undisputed that the Company had in effect since the initial certification of the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC in 1954 or early in 1955, a rule prohibiting all distribution of literature on Company property by any persons, including its employees. (A. 92, 136)[2]

[1] Hereinafter referred to as the Petitioner or Board.

[2] Reference is made to footnote 1 of the Petition which indicates that "A." refers to the appendix to the briefs in the court below, and notes that a copy has been deposited with the clerk of the Supreme Court.

The Union has consistently and without exception recognized and acquiesced in the Company's no-distribution policy. Throughout the years, the Union has frequently distributed handbills to the employees as they were coming to or leaving work. The distributors, however, have always stood at the gates off Company property to make their distributions; and there is no evidence that their efforts were never less than completely successful using this method of distribution. (A. 92, 134, 149, 171-172, 214-215) Throughout this period no grievance has ever been filed protesting the Company's no-distribution policy nor has the Union ever attempted to change the Company's rule through the negotiation process, although several contracts have been negotiated. (A. 94, 136)

On numerous occasions civic organizations, political candidates, and local merchants had requested permission to distribute literature to the Company's employees on its property. These requests had without exception been denied. (A. 112-137)

The only distribution ever permitted on Company premises occurred in 1965 when the Company allowed the Union to distribute a pamphlet to employees. This pamphlet concerned the "City of Hope", a charity supported by the Union. The distribution occurred prior to the Union's solicitation for the charity and was allowed by the Company only after the president of the local Union specifically requested permission that Respondent make an exception to its rule and permit the distribution. (A. 133-134)[3]

The Company offered to prove that there was no organizational drive taking place, or rival-union activity

[3] Reference is made to footnote 2 of the Petition.

at the Company at the time the unfair labor practice charges were filed. (A. 94-96) Although the offer of proof was rejected, the trial examiner assumed that the situation did not exist. (A. 97)

The Board found that the Union had in fact waived the right of all bargaining unit members to distribute literature for any purpose on the Company's premises. The Board, however, abandoning its existing precedent in *Gale Products, Inc.*, 142 NLRB 1246 (1963)[4], concluded that the incumbent Union's waiver was not binding upon any of its bargaining unit members insofar as it permitted the Company to prohibit the employees from distributing literature on behalf of either the incumbent or a rival labor organization "which pertains to: (1) the employees' selection or rejection of a labor organization as the bargaining representative of the employees; or (2) other matters related to the exercise by employees of their Section 7 rights." (Footnote omitted) (App. C of Petition, page 24)

The Court of Appeals for the Sixth Circuit denied enforcement of the Board order holding that a "bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of special circumstances not present here." (App. A of Petition, page 15)

ARGUMENT

Petitioner, National Labor Relations Board, is attempting to obtain a writ of certiorari on two grounds, namely: (1) that the Courts of Appeal of the Sixth and Seventh

[4] Reference is made to footnote 3 of the Petition which describes the Board's decision in the *Gale Products* case.

Circuits have rendered decisions in conflict with the decisions of the Courts of Appeal of the Fifth and Eighth Circuits, on the same matter, and (2) that the right of employees to distribute literature is a fundamental right which cannot be waived through collective bargaining. Respondent respectfully submits that even if there is a conflict between the Circuit Courts of Appeal on the matter involved it is so insignificant as to not warrant review; and to some extent a cause of this, it has been recognized that the right of the employees to distribute literature is not so fundamental that it cannot be waived by the duly authorized bargaining agent of the employees.

1. EVEN IF THERE IS A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL IT IS SO INSIGNIFICANT AS TO NOT WARRANT REVIEW.

In support of its argument that there exists a conflict among the Circuits on the ability of a company and a union to contractually waive the employees' right to distribute union literature, the Petitioner cites *National Labor Relations Board v. Mid-States Metal Products, Inc.*, 403 F. 2d 702 (5th Cir., 1968), and *International Association of Machinists and Aerospace Workers, District No. 9 (McDonnell Douglas) v. National Labor Relations Board*, 415 F. 2d 113 (8th Cir., 1969) (which support the position the Board has taken); and, in conflict with these, the decisions of the Sixth Circuit in the instant case as well as in *Armco Steel Corporation v. National Labor Relations Board*, 344 F. 2d 621 (6th Cir., 1965) and *General Motors Corporation v. National Labor Relations Board*, 345 F. 2d 516 (6th Cir., 1965); and the Seventh Circuit in *National Labor Relations Board v. Gale Prod-*

ucts, Division of Outboard Marine Corporation, 337 F. 2d 390 (7th Cir., 1964); aligned with these decisions, Petitioner also cites the opinions in *United Steelworkers (Armco Steel Corporation) v. National Labor Relations Board*, 377 F. 2d 140 (D.C. Cir., 1966); and *United Aircraft Corporation v. National Labor Relations Board*, 440 F. 2d 85 (2d Cir., 1971).

In the *Mid-States* case, the company was undergoing anti-union activity, and the Fifth Circuit found that contractually agreed-to broad bans against solicitation *and* distribution anywhere in the plant had been enforced. The court held that the right to distribute union literature was a right "too fundamental to be contracted away by the union as was here done." However, the court went on to say that *"we have no doubt that a bilateral company-union limitation may be agreed upon and maintained if there is proof of unusual circumstances as required to make valid a prohibition unilaterally imposed by the company. But there was no such proof in this case."* (Emphasis added.) 403 F. 2d 702, 706.

In the *Machinists* case, the Eighth Circuit was faced with a broad no-distribution rule contractually negotiated by the company and the union. The court acknowledged the Fifth Circuit holding in *Mid-States*, and ruled that "we are inclined *in this case* to follow the Fifth Circuit and to hold the union cannot *totally* waive the employees' rights to distribute literature in non-work areas of the company during non-work time." (Emphasis added.) 415 F. 2d 113, 115.

In the *Armco Steel* case, traditional rival-union activity was taking place. The Sixth Circuit was asked to review a no-distribution provision of Armco's collective bargaining

agreement. It found that the provision was uniformly enforced against all employees and that there were means of communication with employees alternative to the distribution of union literature on company property. Because the court found this relevant, it held that "whatever right employees had under Section 7 to distribute union literature on company property may be waived by their collective bargaining representative." 344 F. 2d 621, 624. The court adhered to this ruling in the subsequent *General Motors* case, *supra*. The Sixth Circuit in the instant case amended its *Armco Steel* ruling by stating that "the bargaining representative has authority to waive on-premises distribution rights of the employees *at least in the absence of special circumstances not present here.*" (Emphasis added.) (App. A of Petition, page 15)[5] Such a ruling not only indicates a qualification placed on the earlier decision in *Armco Steel*, but evidences the intent of the court to limit its holding in the instant case to the facts and circumstances presented.

In the *Gale Products* case, again the company was faced with rival-union activity, and again, a collective bargaining provision prohibiting distribution *and* solicitation of union literature or union membership on company premises was in effect. The Seventh Circuit found that there was no evidence of discriminatory enforcement of the contract provision and found that the contract provision "did not strip the employees of fundamental rights guaranteed by the Act. The provisions preclude only a con-

[5] In the related case of *United Steelworkers, supra*, the Board, curiously, disregarded its *Gale Products* rule (*supra*, at footnote 4) and deferred to the holding of the Sixth Circuit in *Armco Steel, supra*, and dismissed the charges after reviewing again the same contractual provision in the Armco collective bargaining agreement limiting employee rights to distribute literature.

venient—albeit a most effective—way of their exercise." 337 F. 2d 390, 392. Accordingly, it denied enforcement of the Board order.

In *United Aircraft*, organizational activity was taking place and the collective bargaining agreement provided that there should be no union solicitation during working hours. The Second Circuit after an exhaustive review of the facts did not find "an overriding public interest . . . involved which weighs against finding a waiver of solicitation rights . . . we do not think the ban on solicitation during working hours unduly restricts the unions' access to its members . . .". (Footnote omitted) 440 F. 2d 85, 96-97.

It is evident from the above cases that a conflict, if any, among the Circuits is insignificant. Each of the decisions of the Circuit Courts of Appeals cited by Petitioner recognizes that the validity of a contractual waiver of employees' rights to distribute literature depends upon the facts presented and that there may be exceptions to their holdings based upon such facts and circumstances. This is particularly apparent in light of subsequent decisions in those circuits cited by Petitioner in support of its holding in this case.

The Eighth Circuit recently had occasion to discuss the circumstantial validity of a company-imposed rule[6] limiting solicitation *and* distribution on company property in *McDonnell Douglas Corporation v. National Labor Relations Board*, 472 F. 2d 539 (8th Cir., 1973). As in the

[6] Footnote 2 of the decision indicated that McDonnell Douglas had in effect another no-solicitation, no-distribution rule for the past 14 years. This is conceivably the rule invalidated in the *Machinists* decision which the company through settlement in that case agreed not to enforce.

Machinists case, the same company, McDonnell Douglas, and its St. Louis production facility were involved. However, the case was generated not by the Machinists but by its rival-union, the Technical Employees of Aerospace Manufacturers (TEAM), 472 F. 2d 539, 541. Although a contractual waiver was not at issue, the court recognized factors relevant in determining the validity of a contractual waiver. The decision emphasized the significance of the facts as presented in each case, and how the Board should balance the interests involved and not pay merely "lip service" to existing precedent but apply them to the facts. The court held that when a company in attempting to rebutt a presumption of invalidity of its rule which infringes upon Section 7 rights, "makes a creditable showing of special, justifying circumstances, as was done in this case, the Board in weighing that evidence must responsibly and in a meaningful way consider the importance of the proferred justification and thereby determine whether the *actual* impact of the contested rule upon Section 7 rights mandates the invalidation of the rule." (Emphasis added.) 472 F. 2d 539, 545-546.

Less than a month after its decision in *Mid-States*, the Fifth Circuit Court of Appeals again reviewed the question of whether or not a company and a union could contractually prohibit solicitation and distribution on company property in the case of *Mason and Hanger-Silas Mason Co. v. National Labor Relations Board*, 405 F. 2d 1 (5th Cir., 1968). Just as the facts and circumstances of the instant case are clearly distinguishable from the facts and circumstances in *Mid-States* and *Machinists*, the court found:

> The case at bar . . . is clearly distinguishable on its facts from *Mid-States*. The contract clause *sub judice* concerns a prohibition against solicitation *only* on working time. Moreover, the specific Section 7 rights involved in *Mid-States* related to the selection or non-selection of a bargaining agent. The instant case, on the other hand, concerns activity for the purpose of economic advantage. Consistent with the rational of *Mid-States*, we feel that the interests of contractual stability sufficiently outweighs considerations of individual rights in this case so as to make appropriate, where applicable, the enforcement of the contractual prohibition against solicitation. (Emphasis added.) 405 F. 2d 1, 5.

It should be noted that this decision of the Fifth Circuit is in complete accord with the holding of the Sixth Circuit in the instant case. For in the case now at bar, the literature to be distributed did not deal with the selection or rejection of a bargaining representative as was the situation in *Mid-States*, but was a union leaflet. (Petition at page 4) Thus, it would fall within the Fifth Circuit's definition of activity for the purpose of economic advantage. The Fifth Circuit's decision in *Mason & Hanger* is just as *contra* to the Board's holding in the instant case as is the decision of the Sixth Circuit.

Because there is a lack of sufficient conflict among the circuits and with the decision in the instant case as to the ability of a company and union to contractually negotiate the right of employees to distribute literature, a grant of certiorari is not warranted by this Court; in addition, the Sixth Circuit specifically limited its finding to the facts presented and thereby implied that under different circum-

stances it may well find that a collective bargaining representative did not have authority to waive on-premises distribution rights of the employees it represents. As such it cannot support the broad question the Board has presented to the Court for consideration and is not the proper vehicle for the review sought by the Petitioner.

2. THE RIGHT OF THE UNION AND THE EMPLOYEES TO DISTRIBUTE LITERATURE IS NOT SO FUNDAMENTAL THAT IT CANNOT BE NEGOTIATED.

The Petitioner argues that the court below, in not recognizing the fundamental freedom of the individual to distribute literature impermissibly intruded upon the Board's function of striking a balance among "conflicting legitimate interests" which will "effectuate national labor policy". *National Labor Relations Board v. Truck Drivers Union*, 353 U.S. 87, 96 (1957). However, what are also involved in this case are the principles of the collective bargaining process and freedom of contract as well as the objectives of industrial stability and peace central to and underlying the National Labor Relations Act.

There is no freedom more fundamental to effectuating the national labor policy than the freedom between a company and the bargaining representative of its employees to contract. While Petitioner recognizes that the bargaining representative of employers and employees may waive certain of the employees' statutory rights such as the right to strike or the right to bargain about subjects within the area of mandatory bargaining (Petition at page 9), it attempts to distinguish these rights from employee distribution and solicitation rights on the basis that "the right to choose or change a bargaining representative is not

dependent upon collective action for its effectiveness, but can be exercised by each employee individually." (Petition at page 10)

Such contentions completely ignore the Act and the procedures established by the Board to effectuate it. Under Board policy and procedure stated above, in order for employees to choose *or* change a bargaining representative, they must act in concert with one another; a certain percentage of the employees in the appropriate unit to be represented must petition for representation and if an election is held by the National Labor Relations Board, a majority of those employees voting must vote for representation. Clearly, this is not the act of a single individual, but its effectiveness is totally dependent upon collective action.

It is well-settled that a union acting as the selected representative of an employer's employees represents and acts as the agent for *all* employees composing the appropriate bargaining unit. This principle holds true even though certain of those employees voted against representation by the particular union involved, and even though a majority of them may disagree with and object to certain principles governing their working conditions agreed upon by the union and the employer. The basic premise that an incumbent union represents all employees in the bargaining unit equally is clearly set forth in *J. I. Case Company v. National Labor Relations Board,* 321 U.S. 332, 339 (1944), where the United States Supreme Court stated: "The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules . . ."

But Petitioner attempts further to distinguish the right

of a bargaining representative to waive certain employees statutory rights from its right to waive an employees' solicitation and distribution rights by stating that the right to choose or change a bargaining representative is a fundamental freedom which the individual possessed "prior to the selection of a representative." (Petition at page 10) However, Section 7 of the Act specifically gives employees the right to act in concert with one another for mutual aid and protection or for the purpose of collective bargaining about wages, hours, and working conditions, even without a duly authorized bargaining representative. Thus, the right to strike and the other rights which Petitioner admits may be waived by a bargaining representative of employees are likewise possessed by employees prior to the selection of a representative, and even in the absence of a representative, just as much as the employees' right to choose or change a bargaining representative. In short, the right of an employee to distribute literature is no more fundamental under the facts and circumstances of this case as is the employees' right to strike or act in concert with other employees under Section 7 of the Act.[7]

As the Supreme Court stated in *Republic Aviation Corporation v. National Labor Relations Board* and its companion case decided in the same opinion, *National Labor Relations Board v. LeTourneau Company of Georgia*, 324 U.S. 793 (1945), the rights to self organization assured to employees and the equally undisputed right of

[7] It is interesting to note that until this decision the Board under its *Gale Products* rationale did not believe that the right to distribute or solicit was so fundamental that it could not be waived at least as to Section 7 rights and organizing activities of the waiving union and the employees supporting it. This was strikingly demonstrated by the Board's inaction in the *United Steelworkers* case discussed at footnote 5, *supra.*

employers in their property rights are not unlimited in the sense that they can be exercised "without regard to any duty which the existence of rights in others may place upon the employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society." 324 U.S. 793, 798.

Much of the Board's argument that the right to distribute literature is a fundamental one is based upon its assertion that the plant is the "place uniquely appropriate" for employees to obtain information from their fellow employees. (Petition at page 8, citing *Republic Aviation, supra.*) However, as the Board itself has recognized, effective distribution of literature depends only upon receipt of the material being distributed, and not to any extent upon the location at which it is received.

> The distinguishing characteristics of literature as contrasted with oral solicitation—and a distinction too often overlooked—is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. *Hence the purpose is satisfied so long as it is received.* (Emphasis added.) (Footnote omitted) *Stoddard-Quirk Manufacturing Company,* 138 NLRB 615, 620 (1962).

An analysis or consideration of whether or not effective alternate means of communication exist is necessary before any finding should be made that the right to distribute literature cannot be waived. As the Supreme Court stated in *National Labor Relations Board v. United Steelworkers of America (Nutone),* 357 U.S. 357 (1958), when discussing the considerations which must enter into the

balancing process by which the validity of a no-solicitation /distribution rule is determined:

> No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their messages to the employees. Just as that is a *vital consideration* in determining the validity of a no-solicitation rule, (Citations omitted) it is highly relevant in determining whether a valid rule has been fairly applied. Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command the labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it. (Citations omitted.) *No such mechanical answers will avail for the solution of this non-mechanical, complex problem in labor management relations.* If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of the no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of this anti-union views, there is no basis for invalidating these 'otherwise valid' rules. *The Board, in determining whether or not the enforcement of such a rule and the circumstances of an individual case is an unfair labor practice, may find relevant alternative channels available for communication on the right to organize.* When this important

> issue is not even raised before the Board and no evidence bearing on it is adduced, the concrete basis for appraising the significance of the employer's conduct is wanting. (Emphasis added.) 357 U.S. at 363-364.

The Company respectfully submits that in accordance with the guidelines set forth by the Supreme Court as cited above Petitioner should have at a very minimum examined the availability and effectiveness of alternate means of communication before completely depriving the Company and the Union of their freedom to contract and injecting itself directly into the collective bargaining process. Certainly, it is most difficult to accept the Board's bare, unsupported assertions that the plant is a place so uniquely appropriate for employees to obtain information or that on-premises distribution rights are so fundamental and imperative to employees as to nullify an agreement between the Company and the Union when the Board has not in any way demonstrated that the agreement cannot be given full effect with but slight, if any, impact on or impairment of employees' Section 7 rights.

The Board has completely failed to demonstrate any significant interference with employees' Section 7 rights which would in any way justify its interference with the agreement of the parties. In fact, the undisputed evidence presented to the trial examiner showed that alternate means of communication were readily available, were used, and were completely effective. Rather, what the Board has done has been to apply a "mechanical answer" to a technical question involving the balancing of employer and employee interests involved. Because of the Board's failure to consider the impact and effect of the

waiver in conjunction with the success of other methods of distribution used, the Court is placed in the position of not being able under the facts and circumstances of this case to decide the question presented by Petitioner. Thus, the Board has not established by its own review the necessary foundation to merit the granting of this Petition.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that this case does not merit the Court's consideration and that the Petition for a writ of certiorari should be denied.

Respectfully submitted this 1st day of September, 1973.

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